REME COURT. U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

NO. 710

WILLIAM TRAVIS BLACKBURN,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Statement of the Case	3
Federal Jurisdiction	5
Reasons Relied Upon for the Allowance of the Writ	5
Appendix I	16

CITATIONS

Anderson v. Nelson, 20 L ed 2d 81	11
Coppedge v. United States, 369 US 438, 8 L ed 2d 21, 82 S Ct 917	13
Fletcher v. United States, 118 App DC 137, 332 F2d 724	8
Griffin v. California, 380 US 609, 14 L ed 2d 106, 85 S Ct 1229, 381 US 957, 14 L ed 730, 85 S Ct 1797	11
San Fratello v. United States, 340 F2d 560, 343 F2d 711	9
Small v. Robbins, 258 F Supp 621, 371 F 793, 386 US 1033, 18 L ed 2d 594, 87 S Ct 1483	9
Viereck v. United States, 318 US 236, 248, 63 S Ct 561, 566, 87 L ed 734, 741	10

INDEX

Page

Statutes

Title 18 U.S.C. 371 5

Title 28 U.S.C. 1254 2

Constitution of the United States

Rules

United States Supreme Court Rule 19 (b) 12

Rules of Criminal Procedure 39 (d) 13

Rule 15 of the United States Court of Appeals, Fourth Circuit 13

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, William Travis Blackburn, prays that a Writ of Certiorari issue to the United States Court of Appeals

for the Fourth Circuit to review the judgment of that Court affirming judgment of the United States District Court for the Middle District of North Carolina.

OPINION BELOW

The judgment of the Court of Appeals for the Fourth Circuit (Petitioner's Appendix I) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit sought to be reviewed was entered in the Office of the Clerk of said Court of Appeals on October 4, 1968. The jurisdiction of this court is invoked pursuant to Title 28, U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Was the court in error in failing to direct a verdict of acquittal at the close of all the evidence?

2. Were the rights of petitioner Blackburn prejudiced by the remarks of the court as contained in the transcript page 45, beginning with line 11 and continuing through line 25, and that portion of page 46 of the transcript commencing with line 1 and extending through line 8?

3. Were the rights of petitioner Blackburn prejudiced by the examination of one Jimmy Lee Martin in the presence of the jury as set forth on page 88 of the transcript beginning with line 12 and running through line 25, entire page of page 89, and line 1 of page 90?

4. Did the argument of the United States Attorney as set forth on page 202 of the transcript, beginning with line 16 and running through line 25 and page 203 of the transcript beginning with line 1 and running through line 6, and also page 205 of the transcript beginning with line 10 and running through line 24 prejudice the rights of the petitioner?

5.(A) Did the United States Court of Appeals for the Fourth Circuit deprive the petitioner of his constitutional rights in denying oral argument to counsel for petitioner before reaching a final determination of the merits of the case of petitioner before said court?

(B) The United States Court of Appeals for the Fourth Circuit did violate Rule 19, sub-section (b), United States Supreme Court Rules, in that it did so far depart from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States.

18 U.S.C. 371.

Rule 39, sub-section (d) of Rules of Criminal Procedure.

United States Supreme Court Rule 19.

Rule 15 of the United States Court of Appeals, Fourth Circuit.

STATEMENT OF THE CASE

William Travis Blackburn, along with Isaac Call, was indicted in the United States District Court for the Middle District of North Carolina in Wilkesboro for a conspiracy to violate the laws of the United States relating to distilled spirits, in violation of 18 U.S.C. 371, allegedly occurring during a period of time from May, 1967, to and including July 26, 1967. A plea of not guilty was entered.

Testimony was presented by the Government through one John Dale Brooks, named as a co-conspirator but not

indicted, and he tesitified that during the latter part of May, 1967, Isaac Call, co-defendant, contacted him, John Dale Brooks, at his home in Alleghany County, Middle District of North Carolina, and proposed to furnish equipment and supplies to John Dale Brooks to set up and operate illicit distilleries. That no agreement was reached at that time, and subsequently Isaac Call contacted him again and that thereafter Isaac Call contacted him again, and that thereafter Isaac Call caused to be delivered to him stills, sugar, and distilling apparatus and equipment, and Isaac Call stated to John Dale Brooks that he would subsequently be contacted by William Travis Blackburn.

The bill of indictment states further that on July 8, 1967, William Travis Blackburn and one Jimmy Lee Martin, named as co-conspirator but not named in bill of indictment, contacted John Dale Brooks and picked up a load of non-tax-paid whiskey The testimony of John Dale Brooks was materially different. There was additional testimony on behalf of the United States Government, the other witnesses being agents of the Alcohol and Tobacco Tax Division, to the effect that various vehicles bearing illicit spirits were convoyed by the defendants William Travis Blackburn and Isaac Call, although no vehicle at any time being operated by Blackburn was seized and found to contain illicit whiskey. There was testimony offered by the Government that a 1961 Volvo sedan was seized and that same contained non-tax-paid spirits, in the vicinity of Farmington, North Carolina, but no evidence that this particular 1961 Volvo sedan was loaded with illicit spirits at or near the distillery located in Alleghany County near the home of John Dale Brooks. There was evidence that an unregistered distillery located near the home of one Andy Brooks in Alleghany County, North Carolina, was

destroyed by the agents of the Alcohol and Tobacco Tax Division in the latter part of July, 1967. Andy Brooks is the father of John Dale Brooks.

At the close of the foregoing evidence a motion for judgment of acquittal was made on behalf of Blackburn which was overruled. The case was submitted to the jury and a verdict of guilty was rendered, and the petitioner was sentenced to the custody of the Attorney General for a period of forty (40) months, and in addition thereto a fine of $1,000.00 was imposed.

In apt time a notice of appeal was taken to the United States Court of Appeals for the Fourth Circuit, and a brief was filed. Subsequently counsel for the petitioner was advised that this case was set for oral argument in Richmond, Virginia, before said Circuit Court for October 9, 1968. Subsequent thereto said court notified petitioner through his counsel of record that the court was denying petitioner, through counsel, the right of oral argument. Then on October 4, 1968, the United States Court of Appeals, Fourth Circuit, affirmed petitioner's conviction in the District Court.

FEDERAL JURISDICTION

This was a criminal action instituted by the United States upon an indictment charging the petitioner with violation of criminal statutes under the Internal Revenue Code, 18 U.S.C. 371, etc. This was the basis for Federal jurisdiction of this case.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The decision of the Court of Appeals in this case is in conflict with applicable decisions of the Supreme Court of

the United States and other Federal Circuit Courts, and is specifically in conflict with the following decisions:

1. Fletcher v United States, 118 App DC 137, 332 F2d 724.
2. San Fratello v United States, 340 F2d 560, reh den 343 F2d 711.
3. Viereck v United States, 318 U.S. 236.
4. Anderson v Nelson, 20 L ed 2d 81.
5. Griffin v California, 380 U.S. 609.
6. Coppedge v United States, 369 U.S. 438.
7. Small v Robbins, 386 U.S. 1033.
8. United States Supreme Court Rule 19.
9. Rules of Criminal Procedure, Rule 39, sub-section (d).
10. Rule 15 of the United States Court of Appeals, Fourth Circuit.
11. Constitution of the United States.

In the case at bar the trial court submitted the case to the jury on evidence which was very contradictory, such as contained in the transcript, page 52:

"Q. And did Mr. Blackburn or Mr. Call come up there at that time before you set the stills up?

A. No, sir.

Q. They did not? Did you set the still up or the stills up?

A. Yes, sir."

At other places in the testimony of the witness for the Government, John Dale Brooks, he states that after he run whiskey off Mr. Blackburn came up to his place about two

weeks after he had run the liquor off. Apparently the whiskey was loaded in a black foreign car and the witness never identified it as a Volvo which is mentioned in the testimony of the other witnesses. We do not find in the transcript of the evidence where there was testimony that the whiskey or material loaded onto the black foreign car had come from a distillery that was unregistered. Neither is there evidence that the Volvo car upon which 121 gallons of whiskey was loaded, and seized at Farmington, came from the distillery operated by Brooks in Alleghany County, North Carolina.

Petitioner contends that the United States failed to properly show that the defendant Blackburn and his co-defendant Call were acting in unison and concert and conspiring together to violate the Internal Revenue laws.

In regard to the second question, your petitioner earnestly contends that the Court did prejudice the rights of this petitioner when it did admonish, in the presence of the jury, counsel for co-defendant Call as set forth in the transcript, page 45, lines 11 through 25, and page 46, lines 1 through 8. The Court concluded its admonishment to counsel for Call by saying: "Are you serious about that?" Petitioner contends that such remark did tend to demean the defendant Call and co-defendant Blackburn in the eyes of the jury.

Petitioner contends that it was prejudicial for the Government to examine prospective witness Jimmy Lee Martin as set forth on page 88 of the transcript, beginning with line 12 and extending through line 25, page 89, and line 1 of page 90.

As reflected in this testimony Jimmy Lee Martin was called around to testify on behalf of the Government, and in

the presence of the jury refused to take the witness stand, with the Court insisting three or four times that the witness come around and take the oath, which Martin refused to do, and finally after counsel for your petitioner had suggested to the District Attorney that the jury be excused the jury was excused, after which the witness Martin was held in contempt of court for refusing to testify.

Previously the Government witness, John Dale Brooks, had testified (transcript page 59, lines 15 through 24) that the defendant Blackburn allegedly made the statement to Brooks that the witness Jimmy Lee Martin was working with the ATU men, and "* * *I'll get him to come up here to get some whiskey and you can kill him."

FLETCHER v U.S., 118 App DC 137, 332 F2d 724.

"Calling alleged accomplice of defendant charged with robbery of taxicab driver, and asking him questions which he refused to answer on grounds that answer might incriminate him, unfairly prejudiced defendant because inferences from refusals to answer added critical weight to prosecution's case in form which was not subject to cross-examination, *** although trial court instructed jury to draw no inferences of guilt from witness' refusals, it added that witness' exercise of his constitutional right 'does not mean by itself, of course, that this defendant is guilty,' and thus jurors might have understood statement to mean that refusals might be considered along with other evidence as proof of defendant's guilt." (Quoted from ALR 2d Later Case Service, Vol. 6, page 658; supplementing ALR 2d 1443-1456.)

SAN FRATELLO v. U.S., (CA5 Fla.) 340 F2d 560, reh den 343 F2d 711.

This case held that:

"Facts showed prejudicial error in calling defendant's wife as witness so as to require her to claim her privilege against self-incrimination in presence of jury, although she had claimed privilege in previous trial and had advised prosecutor she would assert it in this case. Instruction to jury in connection with matter did not render error harmless." (Quoted from ALR 2d Later Case Service, Vol. 6, page 658; supplementing ALR 2d 1443-1456).

The court will bear in mind that the witness Jimmy Lee Martin is first mentioned in the bill of indictment as a co-conspirator although not named as a defendant in the bill of indictment. The co-conspirator is mentioned repeatedly in the testimony presented by the United States.

Petitioner vigorously contends that the decision of the Court of Appeals for the Fourth Circuit in not granting a new new trial is directly in conflict with the cases of *FLETCHER v. UNITED STATES*, supra, and *SAN FRATELLO v UNITED STATES*, supra.

This Court's attention is also directed to the recent case of *SMALL v ROBBINS, (DC Me.) 258 F Supp 621, affd (Cal) 371 F 793, cert den 386 US 1033, 18 L ed 2d 594, 87 S ct 1483;* certiorari was denied in the United States Supreme Court in this case on May 8, 1967. The Court of Appeals for the First Circuit held:

"Prosecutor's separate questioning of witness, while holding, and formulating questions from, statement

given by witness to police at time of his arrest, after prosecutor knew or should have known that witness would refuse to answer on valid self-incrimination grounds, was prejudicial to defendant on trial; inferences from witness' refusal to answer added critical weight to prosecution's case in form not subject to cross-examination and prejudice was not curable by cautionary instructions given by trial court; consequently, defendant's conviction was obtained in violation of his rights under confrontation clause of Sixth Amendment." (Quoted from ALR 2d Later Case Service, Vol. 6, Pocket Parts page 301; supplementing ALR 2d 1446.)

Petitioner earnestly contends that the argument of the United States Attorney as set forth on page 202 of the transcript, lines 16 through 25, page 203, lines 1 through 6, and page 205, beginning with line 10 and running through line 24 were highly prejudicial.

The District Attorney argued that the co-conspirator Jimmy Lee Martin would not testify because he would be afraid that if he left his house that his house would be burned and one of his own family would be burned up. The District Attorney also argued at page 205, beginning with line 10 and extending through line 13, that if these defendants, meaning defendants Blackburn and Call, had any defense or anyone who could have aided their cause they were at liberty to call them.

VIERECK v. UNITED STATES, 318 US 236, 248, 63 S Ct 561, 566, 87 L ed 734, 741:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty

> whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (Quoted from 3 ALR 3d 963, 964.)

The holding of the Circuit Court that petitioner was not entitled to a new trial is directly in conflict with the recent case of *WILLIAM A ANDERSON, PETITIONER, v LOUIS S NELSON, WARDEN,* which was filed by the Supreme Court of the United States on April 1, 1968, and reported in *20 L ed 2d 81*. This case distinctly held that the prosecutor's comment on a defendant's failure to testify in his state trial for crime cannot be labeled harmless error where such comment is extensive, and where an inference of guilt from silence is stressed to the jury as a basis for conviction.

GRIFFIN v. CALIFORNIA, 380 US 609, 14 L ed 2d 106, 85 S Ct 1229, reh den 381 US 957, 14 L ed 730, 85 S Ct 1797. In that case it was held:

> "The Fifth Amendment, in its direct application to the federal government, and its bearing on the states by reason of the Fourteenth Amendment, forbids either

comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt; hence, a state may not validly apply to a state criminal prosecution a state constitutional provision that in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." (Quoted from 14 L ed 2d 107.)

Petitioner in conclusion contends that the Court of Fourth Circuit did fail to properly consider his appeal inasmuch as it denied his counsel the right of oral argument before arriving at a final determination of the merits of the case of petitioner before said Court.

Rule 19, sub-section (b) of the United States Supreme Court Rules provides:

"* * * or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Petitioner earnestly contends that while he was under a judgment of the District Court of forty (40) months imprisonment and $1,000.00 fine, and after having undergone the expenses incident to an appeal from the United States District Court to the United States Court of Appeals, Fourth Circuit, that his constitutional rights were abridged by the Court of Appeals departing from the accepted and usual course of judicial proceedings which almost without exception sanctions the right of oral argument before an appellate court.

In fact Rule 15 of the Court of Appeals for the Fourth Circuit provides that the appellant or petitioner in this Court shall be entitled to open and conclude the argument of the case, and goes further to limit the argument to two counsel for each party on the argument of a case, and provides that counsel shall be allowed thirty minutes for the argument and no more without special leave of the court.

Counsel for petitioner is without knowledge of such a departure from the accepted and usual course of argument before the Court of Appeals for the Fourth Circuit.

Throughout the years from the very foundation of our country a universal concept of the average man in regard to the courts of law is that he is entitled to a trial by jury, and upon conviction that he is entitled to a consideration of his case by an appellate court. To depart from such course we say is to deprive a defendant of an old and well recognized constitutional right.

Rule 39, sub-section (d) of the Rules of Criminal Procedure in Federal Court provides as follows:

> "Unless good cause is shown for an earlier hearing, the appellate court shall set the appeal for argument on a date not less than 30 days after the filing in that court of the record on appeal and as soon after the expiration of that period as the state of the calendar will permit. Preference shall be given to appeals in criminal cases over appeals in civil cases."

COPPEDGE v. UNITED STATES, 369 US 438, 8 L ed 2d 21, 82 S Ct 917. The opinion by Chief Justice Warren, at pages 32 and 33, headnotes 24 and 25, truly expresses the

contentions of petitioner that his case was lightly dealt with and ill-considered by the Fourth Circuit Court of Appeals, and we quote from this opinion:

> "In the light of this delay, it is not surprising that petitioner asks us to reach the merits of his case immediately. However, delay alone, unfortunate though it is, is not sufficient cause to bypass the orderly processes of judicial review. Contrary to the Government's assertion here that petitioner has already received what amounts to plenary review of the conviction following his second trial, we hold petitioner has not yet received the benefits of presenting either oral argument or full briefs on the merits of his claims to the court first charged with the supervision of the trial court. The memoranda prepared by counsel in support of petitioner's application for leave to appeal in forma pauperis were not intended to be, nor are they rightly considered as, full appellate briefs. But they do serve to demonstrate that petitioner sought consideration of issues that it would be difficult for an appellate court to consider so patently frivolous as to require a dismissal of petitioner's case without full briefing or argument. In so saying, we need not, and do not, express any opinion on whether petitioner's conviction should ultimately be affirmed or reversed. We only hold that taken as a whole, petitioner's various claims cannot justify the summary disposition of his case ordered below."

Your petitioner respectfully prays that this court grant the petition for writ of certiorari for the reasons as set forth hereinabove.

Respectfully submitted.

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No. 12,402

United States of America,
Appellee,

v.

William Travis Blackburn,
Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Wilkesboro
Edwin M. Stanley, Chief District Judge.

(Decided October 4, 1968.)

Before BRYAN, WINTER and CRAVEN, Circuit Judges.

William H. Murdock for Appellee, and Larry S. Moore for Appellant.

2

PER CURIAM:

The appeal of William Travis Blackburn from his conviction of a conspiracy to violate the Internal Revenue laws relating to distilled spirits, 18 USC 371, presents no grounds justifying a reversal of the judgment of the District Court. The evidence is altogether adequate to establish the guilt of the appellant as a complotter, between May and July 1967 in North Carolina, in offenses involving illicit whiskey. Our consideration of alleged errors of the District Court at trial disclose no basis for these assignments. There is no occasion for argument on the appeal.

Affirmed.